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22 Aylus Networks, Inc.

23
24 UNITED STATES DISTRICT COURT
25
26 NORTHERN DISTRICT OF CALIFORNIA

27 Aylus Networks, Inc., a Delaware corporation,

28 CASE NO. 3:13-cv-4700

Plaintiff,

**AYLUS NETWORKS, INC.’S
OPPOSITION TO APPLE’S MOTION
FOR LEAVE TO AMEND ITS
INVALIDITY CONTENTIONS**

vs.

Apple, Inc., a California corporation

DATE: May 14, 2015

Defendant.

TIME: 1:30 p.m.

PLACE: Courtroom 5, 17th Floor

JUDGE: Honorable Edward M. Chen

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Case No. 3:13-cv-4700

34 AYLUS NETWORKS, INC.’S OPPOSITION TO
35 APPLE’S MOTION FOR LEAVE TO AMEND ITS INVALIDITY CONTENTIONS

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4 **I. INTRODUCTION**

5 Apple served Invalidity Contentions approximately eleven months ago in May 2014; claim
6 construction has been fully briefed, argued and ruled on; and fewer than seven weeks of fact
7 discovery remain. Apple now seeks to (1) amend its charts concerning previously disclosed prior
8 art references; and (2) add three new prior art references to the case. In the interest of judicial
9 efficiency and in an effort to compromise, Aylus is willing to stipulate to Apple's first request,
10 regarding amending its charts concerning previously disclosed prior art references. But Aylus
11 opposes Apple's second request because Apple has not shown good cause for its proposed
12 eleventh-hour addition of three new prior art references. A showing of good cause would require
13 diligence in obtaining/identifying as relevant the new information and a prompt motion to
14 supplement. Here, Apple has demonstrated neither. Each of Apple's three new alleged prior art
15 references could have and should have been identified months ago.

16 Apple's motion is a transparent attempt to hedge its bet on the pending *Inter Partes*
17 Review ("IPR"), in which it no doubt submitted what it believed to be its best prior art based on
18 the broadest reasonable construction of the claims. Now, with the looming prospect that the
19 Patent Trial and Appeal Board ("PTAB") will reject some or all of Apple's grounds for review, it
20 is trying to shore up its invalidity case with new prior art on the pretense that the Court's claim
21 construction has suddenly made this prior art relevant. Not only does Apple's claim construction
22 excuse ring hollow, but the fact that Apple would limit its invalidity contentions to its own narrow
23 self-serving constructions instead of anticipating a broader reasonable constructions as the default,
24 demonstrates its own lack of diligence. Further, Apple admits that it has long since known of the
25 three "new" references; but for its own strategic reasons, elected not to identify them as relevant to
26 its invalidity contentions until now.

27 Even if Apple can establish that the additional references it seeks to add only became
28 relevant after the Court adopted Aylus' claim construction, Apple should have anticipated those

1 constructions. Aylus' initial proposal for the constructions on which Apple relies was to simply
 2 use the plain and ordinary meaning, which would not have incorporated the limits proposed by
 3 Apple and which was disclosed to Apple on July 17, 2014. Declaration of Joby Martin in
 4 Support of Aylus's Opposition to Apple's Motion for Leave to Amend Its Invalidity Contentions.
 5 ("Martin Decl.") ¶ 5, Ex. A. Apple has not explained why it could not have updated its
 6 contentions shortly thereafter or, more importantly, why it was reasonable for it to limit its
 7 invalidity contentions to its own narrow constructions limiting the claims to Universal Plug and
 8 Play ("UPnP") technology, when, as the Court found, "Apple's construction is improper because it
 9 interprets the claim language in a manner that excludes an embodiment expressly contained in the
 10 specification." (Dkt. No. 102 at 12).

11 Contrary to Apple's assertions, the end of fact discovery is right around the corner. In the
 12 scope of this case, the approximately seven weeks remaining for fact discovery, which closes on
 13 June 4, 2015, is very short. Not only is that insufficient time to complete the fact discovery
 14 necessary to fully respond to Apple's newly proposed allegations, but it will require Aylus to
 15 divert critical resources from its effort to complete its fact discovery on all other issue in the case.
 16 Absent sufficient discovery on Apple's belatedly identified references, Aylus will be deprived of a
 17 meaningful opportunity to defend the validity of its patent.

18

19 **II. PROCEDURAL HISTORY**

20 On October 9, 2013, Aylus filed its complaint in this action. Dtk. No. 1. On April 3,
 21 2014, Aylus served its Infringement Contentions. Martin Decl. ¶ 2. Pursuant to the Court's
 22 scheduling orders, on May 12, 2014, Aylus served its First Amended Infringement Contentions.
 23 Martin Decl. ¶ 3. On May 22, 2014, Apple served its initial Invalidity Contentions. Martin
 24 Decl. ¶ 4. On July 24, 2014, the parties exchanged proposed claim constructions. Martin Decl.
 25 ¶ 6. On July 28, 2014, the parties submitted their joint claim construction. Dkt. No. 47. On
 26 September 29, 2014, Apple filed two petitions with the PTAB seeking *In re Partes* Review of
 27 the patent-in-suit. Martin Decl. ¶ 8. On October 20, 2014, the parties presented a technology
 28 tutorial to the Court in which Aylus identified the Microsoft Xbox as the technology over which

1 the patent-in-suit was a substantial improvement. Martin Decl. ¶9. On November 4, 2014, the
 2 Court held the *Markman* hearing in this action and its written claim construction ruling followed
 3 on January 27, 2015. Dkt. No. 102. Apple sent its invalidity contentions with new prior art
 4 reference to Aylus on March 6, 2015 – approximately ten months after its initial Invalidity
 5 Contentions, approximately eight months after it became aware of Aylus's claim constructions,
 6 approximately four months after the Markman hearing, and thirty-eight days after the written
 7 claim construction order. Martin Decl. ¶ 12. Fact discovery is set to close on June 4, 2015.
 8 Dkt. No. 108.

9 **III. LEGAL STANDARD**

10 Amendments to invalidity contentions require a timely showing of good cause. (Patent
 11 L.R. 3-6.) This requires proof of diligence, *i.e.* that the party promptly sought amendment after
 12 discovering the new information. *O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d
 13 1355, 1366-67 (Fed. Cir. 2006). A delay of even a few months may demonstrate a lack of
 14 diligence. See, *id.* (delay of three months not diligent). These rules were “designed to require
 15 parties to crystallize” invalidity theories “early in the litigation and to adhere to those theories
 16 once they have been disclosed.” *Id.* at 1366 n. 12.

17 This Court is “decidedly conservative” towards amendment of invalidity contentions.
 18 *Kilopass Tech., Inc. v. Sidense Corp.*, No. C-10-02066 SI, 2011 WL 5212259, at *1-2 (N.D. Cal.
 19 Nov. 2, 2011) (denying motion for leave to amend invalidity contentions) (internal citation
 20 omitted). Such conservatism is “designed to prevent the ‘shifting sands’ approach to claim
 21 construction.” *Id.*

22 The “good cause” inquiry first considers whether the moving party was diligent in
 23 amending its contentions and then considers prejudice to the non-moving party should the motion
 24 to amend be granted. *Id.* 1366-68. “The diligence required for a showing of good cause has two
 25 phases: (1) diligence in discovering the basis for amendment; and (2) diligence in seeking
 26

1 amendment once the basis for amendment has been discovered.” *Positive Techs., Inc. v. Sony*
 2 *Elecs., Inc. et al.*, 2013 WL 322556, at *2 (N.D. Cal. Jan. 28, 2013); *see also West v. Jewelry*
 3 *Innovations, Inc.*, No. C 07-1812 JF (HRL), 2008 WL 4532558 at *2 (N.D. Cal. Oct. 8, 2008)
 4 (“Thus, a party’s diligence in amending its preliminary invalidity contentions upon finding new
 5 prior art is only one factor to consider; the Court also must address whether the party was diligent
 6 in discovering the basis for the proposed amendment.”). Moreover, “[o]nly if the moving party is
 7 able to show diligence may the court consider the prejudice to the non-moving party.” *Zest IP*
 8 *Holdings, LLC v. Implant Direct Mfg., LLC*, No. 10CV0541-GPC-WVG, 2013 WL 5674834, *7
 9 (S.D. Cal. Oct. 16, 2013).

10 Apple bears the burden of establishing diligence. *O2 Micro*, 467 F.3d at 1366. Absent
 11 diligence, the “good cause” inquiry ends—and the Court need not consider any alleged prejudice
 12 arising from the belated amendment. *Id.* at 1367-68 (affirming denial of motion to amend and
 13 holding there was “no need to consider the question of prejudice” where movant did not act
 14 diligently).

15 **IV. ARGUMENT**

16 **A. Apple Has Not Shown Good Cause To Amend Under Patent Local Rule 3-6**

17 1. The Court’s Claim Construction Does Not Excuse Apple’s Lack of
 18 Diligence in Identifying the Additional Prior Art

19 On September 29, 2014, Apple collected what it no doubt considered its strongest prior art
 20 into two petitions, which it submitted to the PTAB, requesting that the PTAB initiate an IPR as to
 21 all claims of the patent-in-suit. Apple was aware that “[a] claim subject to *inter partes* review
 22 receives the ‘broadest reasonable interpretation’ (‘BRI’) in light of the specification. 37 C.F.R. §
 23 42.100(b),” (Dkt. No. 61-3 at 8), but still limited its prior art to references directed to UPnP
 24 technology. Now, having seen Aylus’ responses to its IPR petitions, Apple is rethinking its
 25 decision to put all its eggs in the UPnP basket. Even though the Court’s claim construction is no
 26 broader than that which the PTAB would apply, Apple contends that the Court has “significantly
 27 broader than that which the PTAB would apply, Apple contends that the Court has “significantly
 28 broader than that which the PTAB would apply, Apple contends that the Court has “significantly

1 enlarged the pool of useful prior art.” Mot. at 6.¹ But the “pool of useful prior art” has not
 2 changed and Apple has not explained why it limited its application of prior art to its own narrow
 3 claim construction.

4 Because Apple was preparing for its IPR and because it was aware at an early stage that
 5 Aylus was seeking a broader claim construction, Apple had every incentive to include in its
 6 original contentions any prior art that it thought might be relevant to its invalidity contentions.
 7 Martin Decl. Ex. A. By failing to do so, it must be “held accountable” for “not prepar[ing] for the
 8 fact that the court may adopt” a broader construction. *Convolve, Inc. v. Compaq Computer Corp.*,
 9 2006 WL 2527773 at *4 (S.D.N.Y 2006) (applying rules modeled after the Northern District of
 10 California Local Patent Rules). Moreover, by sitting back and waiting for the Court to construe
 11 the claims, Apple failed to exercise the required “diligence in discovering the basis for[its
 12 proposed] amendment” *Positive Techs.*, 2013 WL 322556, at *2.

13 The issue here is not when Apple became aware of its three new references, but only when
 14 Apple decided it was in its interest to identify them as prior art and include them in its invalidity
 15 contentions. Apple appears to acknowledge that it was aware of at least two of the new
 16 references, Apple Interactive TV and Cisco Explorer 8000, from presumably before it served its
 17 initial contentions, but that only after the Court’s claim construction did it become “aware of these
 18 products’ relevance” Apple further claims that it became aware of the Microsoft Xbox only at
 19 the technology tutorial. Mot. at 7; Buergi Decl., ¶¶ 2-3.² The issue, therefore, is whether Apple
 20 was diligent in identifying these references as prior art and including them in its invalidity
 21 contentions. As discussed below, it was not.

22 Apple’s only excuse for not identifying at least two of these references as prior art in its
 23 initial invalidity contentions is that “[t]he Court’s broad constructions of these terms . . .

24

¹ Apple’s proposed additional prior art was suitable for an IPR because it consists of printed publications. 35
 25 U.S.C. §311. The features of the products Apple has cited as prior art were all disclosed in documents that, according
 26 to Apple, were publically available. *See* Buergi Decl., Exhibit B at 2, 56 and 86; *In re Hall*, 781 F.2d 897, 899 (Fed.
 27 Cir. 1986) (“public accessibility has been called the touchstone in determining whether a reference constitutes a
 28 ‘printed publication’”)(internal quotes omitted).

27 ² Interestingly, Mr. Buergi states that Apple became aware of the relevance of the Apple Interactive TV and the
 28 Cisco 8000 only on March 2 and March 4, respectively, just days before it submitted nearly a hundred pages of claim
 charts on these two references. Buergi Decl. ¶ 2. Ms. Corbett claimed in an email that Apple was ready to produce
 presumably these same charts days before, on February 27, 2015. Corbett Decl., Ex. B at 2.

1 significantly enlarged the pool of useful prior art” making these references suddenly relevant to
 2 invalidity. Apple admits that its “previously charted prior art was based on Universal Plug and
 3 Play (‘UPnP’),” because that fit with Apple’s proposed claim construction. Mot. at 6. Apple has
 4 not, however, explained why it was reasonable for Apple to conclude that only UPnP prior art was
 5 relevant when the patent specification clearly distinguishes the invention from UPnP. For
 6 example, when construing one of the claim terms at issue here, the Court found that “the term
 7 ‘negotiate media content’ should be construed to encompass a preselection method (*which differs*
 8 *from the UPnP method*), because the preselection method is disclosed in the specification. . . .
 9 Were the ‘412 patent limited to the UPnP method described by Apple, the embodiment in Figure
 10 15 would not be possible.” (Dkt. No. 102 at 12.) (emphasis added). Apple’s reliance on its own
 11 narrow construction was, therefore, unwarranted and unreasonable. The same is true for the
 12 “cooperate . . .” limitation also relied on by Apple. For that term the Court found that “Apple’s
 13 construction expressly disallows [the claim 4] scenario, because it requires the CPPs
 14 involvement.” *Id.* at 15. Apple should have, therefore, anticipated that its narrow constructions
 15 would be rejected.

16 Apple’s reliance on *Positive Tech.* as supporting its amendments here is misplaced. In
 17 that case, the defendant did not already know of the new references, but only discovered them “in
 18 response to new or changed circumstances in the case.” *Id.* at *2. Here, by contrast, Apple
 19 already knew of at least two of the references and reasonably should have known of the third.
 20 Also, in *Positive Tech.*, the Court’s construction of the claim term “matrix display” opened up a
 21 whole new area of prior art, by including polarity-dependent devices within the scope of the
 22 claims making “it reasonable for defendants to dig even deeper [into the prior art] than they had
 23 previously with respect to polarity-dependent devices.” *Id.* at *3. Here, Apple has not shown how
 24 the newly identified prior art is implicated by the Court’s claim construction.

25 Specifically, Apple argues that the Court’s construction of the “negotiate . . .” limitation,
 26 does not require invalidating prior art “to compare transfer protocols and content formats . . .” but
 27 does not explain how that difference implicates the new prior art other than to suggest that it made
 28 non UPnP prior art relevant. As the Court observed, the key feature implicated by this claim

1 construction is whether the claim covers a device “in which the ‘data formats’ and ‘transfer
 2 protocols’ of the MS and MR are *preselected*.” (Dkt. No. 102 at 11) (emphasis original).
 3 Tellingly, in none of Apple’s proposed invalidity charts for the new references does Apple discuss
 4 the references ability to use preselected data formats or transfer protocols. In fact, the terms “data
 5 format” or “transfer protocol” do not appear in any of these charts, nor does the word
 6 “preselected.”³

7 Similarly for the “cooperate . . .” limitation. Although Apple’s claim construction
 8 required “[t]he CPP logic communicates with at least one of the MS and MR, and the CP logic
 9 communicates with at least the other of the MS and MR,” (Dkt. No. 102 at 14), Apple did not
 10 identify this as a feature of *any* of its originally cited prior art. In fact, in only three of its 19
 11 original charts does the word “communicate” or “communicates” appear in Apple’s discussion of
 12 the claim limitation that includes the “cooperate . . .” language and in none of those instances is it
 13 used to describe the limitation proposed by Apple.⁴

14 Apple, therefore, has not and cannot show that the Court’s adoption of Aylus’ broader
 15 specific claim constructions actually caused Apple to reconsider the specifics of its prior art
 16 selection. The most Apple can say is that by rejecting virtually all of Apple’s proposed
 17 constructions the Court decisively rejected Apple’s effort to limit the Aylus claims to UPnP, a
 18 rejection Apple should have reasonably expected.

19 The facts here are similar to those in *Silver State Intellectual Technologies, Inc. v. Garmin*
 20 *International, Inc.*, 32 F.Supp.3d 1155 (D.Nev. 2014), where the court applied local patent rules
 21 very similar to those at issue here to reject defendant’s effort to add new prior art references after
 22 the court rejected defendant’s proposed claim construction.⁵ That court recognized that, as here,

23
 24 ³ In Apple’s original invalidity charts, only three of the 19 charts highlight the UPnP feature of determining the
 25 data format and transfer protocol to use for transfers between the MS and MR. Martin Decl. ¶ 14, Ex. B – D [See E.g.
 26 Froidecoeur (Ex. G) at 6; Vardi (Ex. Q) at 7; and UPnP Design (Ex. P) at 17].

27 ⁴ This feature is also not discussed in any of Apple’s charts for the proposed new references, but that is
 28 expected given that the Court has confirmed that this requirement is not part of the claim.

29 ⁵ The court in *Silver State* recognized the similarly between the Local Patent Rules of the District of Nevada
 30 and those of the Northern District of California. *Silver State*, 32 F.Supp.3d at 1161-62. In fact, the test for showing
 31 good cause is word-for-word identical. Compare N.D.Cal LPR 3-6 with D.Nev. 16.1-12, both of which state that
 32 “Non-exhaustive examples of circumstances that may, absent undue prejudice to the non-moving party, support a
 33 finding of good cause, include: (a) a claim construction by the Court different from that proposed by the party seeking

1 “[t]his is not a case where the Court’s claim construction Order adopted an unexpected
 2 construction that would prompt the parties to evaluate anew any applicable prior art.” *Id.* at 1163.
 3 The court found that the defendant had long been aware of the plaintiff’s proposed construction,
 4 which was to use the plain and ordinary meaning, and was not diligent in waiting to disclose its
 5 new prior art:

6 Garmin has not explained why it did not investigate the newly identified prior art
 7 upon receiving Silver State’s claim construction brief instead of waiting to see how
 8 the Court would construe the user preferences claim limitations. Garmin was aware
 9 of the risk, and should have prepared for the possibility, that the Court would adopt
 10 Silver State’s proposed construction. **The Local Patent Rules do not contemplate
 11 allowing a party to postpone disclosures in the hope the Court will adopt its
 12 proposed claim constructions, and disclosing all pertinent contentions and
 13 supporting prior art only after the party loses at claim construction.**

14 *Id.* (emphasis added). Apple has not and cannot explain why it did not anticipate the Court’s
 15 claim construction and identify these prior art references months ago.

16 2. Apple Has Not Demonstrated that the Proposed New References are Any
 17 More Relevant Than the Original References

18 The court should also consider “such factors as the relevance of the new prior art and the
 19 difficulty of locating the prior art.” *Synopsys Inc v. Mentor Graphics Corp.* 2014 WL 1477917, *2
 20 (N.D.Cal. 2014 (internal quotes omitted)). Here, Apple has not explained any particular relevance
 21 of the three proposed new references other than to argue that “[t]he Court’s broad constructions
 22 turned the Cisco, Apple and Microsoft set-top boxes into relevant prior art for the reasons
 23 discussed above.” Mot. at 6-7. As discussed above, however, the only “reasons” Apple gives
 24 are its generic discussion of two specific claim terms, the specific constructions of which do not
 25 appear to factor into Apple’s actual invalidity contentions. Apple has not, for example, argued
 26 that the newly cited references are any closer to the claimed invention than the previously cited
 27 references or that adding them will get Apple any closer to satisfying its burden on invalidity.
 28 Rather, Apple appears to want these references in the case only so it can avoid the charge that all
 of its prior art is related to UPnP, when the patent clearly claims something different.

29 amendment; (b) recent discovery of material prior art despite earlier diligent search; and, (c) recent discovery of
 30 nonpublic information about the Accused Instrumentality despite earlier diligent search. The duty to supplement
 31 discovery response does not excuse the need to obtain leave of Court to amend contentions.”

1 3. Apple's Delay Demonstrates a Lack of Diligence

2 Even assuming the Court's adoption of Aylus' claim construction truly motivated Apple's
 3 addition of the new references, Apple's diligence should be measured from July, 2014, when
 4 Apple first learned of Aylus' proposed construction of the two claim terms relied on by Apple;
 5 and not the date of the Court's claim construction order.⁶ By July Apple should have reasonably
 6 anticipated that its narrow claim constructions, which were inconsistent with the patent
 7 specification and other patent claims, would not likely survive the claim construction process. At
 8 that time Apple should have begun its process of researching additional prior art, including the
 9 prior art of which it was already aware, the Apple and Cisco references, and other similar
 10 references, *e.g.*, the Microsoft reference.

11 Apple does not, because it cannot, justify its true delay in identifying the new references.
 12 Apple's motion admits that it was able to research, identify and draft contentions for the new
 13 references within weeks of the Court's claim construction, so it cannot possibly justify waiting
 14 eight months to identify the Apple and Cisco references and at least five months to identify the
 15 Microsoft reference.⁷ Apple's unjustified delay in identifying its new prior art and amending its
 16 invalidity contentions establishes a lack of diligence and forecloses the required showing of good
 17 cause.

18 **B. Allowing Apple to Amend its Invalidity Contentions at This Late Stage
 19 Would Unduly Prejudice Aylus**

20 Where, as here, the moving party cannot show diligence, a court need not consider the
 21 prejudice to the non-moving party. *O2 Micro*, 467 F.3d at 1368; *Genentech, Inc. v. Trs. Of the*
22 Univ. of Pa., No. 10-CV-02037, 2011 U.S. Dist. LEXIS 108127, at *4 (N.D. Cal. Sept. 16, 2011).
 23 However, if the Court chooses to reach this question, Apple's late supplementation will prejudice
 24 Aylus at least because Aylus will not have adequate opportunity to take discovery on Apple's
 25 newly asserted prior art references.

26 ⁶ In its Patent L.R. 4-2 Disclosures on July 17, 2014, Aylus proposed using the plain and ordinary meaning for
 27 both claim terms. In the Patent L.R. joint claim construction chart, filed on July 28, 2014, Aylus added an alternative
 construction for the "negotiate . . ." term. That alternative construction was adopted by the Court.

28 ⁷ The five months is generously measured from when Apple claims to have been made aware of the Microsoft
 Xbox, at the tutorial in October.

1 Apple has identified at least 34 separate documents as related to these three new
 2 references, most of them from third parties. *See* Buergi Decl., Exhibit B at 2, 56 and 86.
 3 These documents, many of which Apple only recently produced, do not tell the whole story and
 4 Aylus may need to take additional discovery from Apple as well as third parties Microsoft and
 5 Cisco.⁸ As Apple knows, third party discovery is especially slow and difficult. For example,
 6 Apple's subpoena to Microsoft, which Apple claims to require documents by April 3 and a
 7 deposition by April 17, has yet, as far as Aylus is aware, to yield either documents or a schedule
 8 for a deposition. Martin decl., ¶ 15.

9 Aylus has many things to accomplish in the remaining seven weeks of discovery without
 10 the added burden of taking discovery on these tardily identified references. For example, Aylus is
 11 working diligently to complete necessary discovery on all the issues properly raised in this case,
 12 and needs all available time and resources directed at those tasks, including preparing to take and
 13 defend over twenty-eight depositions; reviewing recent productions of at least 761,972 pages of
 14 documents (over 50% of its total production), which Apple only produced in the last five weeks;
 15 and preparing to produce ESI from numerous Aylus custodians over the coming weeks. Aylus
 16 would be prejudiced if it was required to divert its attention and resources from these important
 17 efforts to accommodate Apple's eleventh-hour addition of new prior art – prior art it has known
 18 about for many months if not longer. This is especially true because any hope that third party
 19 discovery would yield any fruit would require Aylus to divert those resources now, weeks before
 20 the Court is scheduled to rule on Apple's motion, which is not set for hearing until May 14, 2015.

21 To deflect from its failure to timely identify the proposed new references, Apple tries to
 22 shift the blame, contending that Aylus "should have expected the claims to encompass such prior
 23 art and therefore it should come as no surprise to Aylus that Apple now seeks to amend its
 24 invalidity contentions to include such prior art." Mot. at 8. But it is Apple's burden to prove
 25 invalidity and Aylus has no obligation to anticipate what art Apple might or might not chose to
 26 rely on. Apple also mischaracterizes Aylus' reference to the Microsoft Xbox as somehow putting

27
 28 ⁸ Because Cisco is a Quinn Emanuel client, Aylus will need to engage separate counsel to pursue discovery
 from Cisco, which will further complicate and delay any such effort.

1 Aylus on notice that Apple might rely on that device as prior art. It did not. Aylus referenced
2 the general features of the Xbox as an example of the state of the art at the time of the invention,
3 *not* “as embodying the technology of the ’412 patent.” *Id.* The Xbox was old, the Aylus patent was
4 new. Aylus never considered the Xbox as relevant prior art to its patent and Aylus could not have
5 anticipated Apple’s reliance on it now.

6 Apple’s proposed eleventh-hour addition of new prior art references would greatly
7 prejudice Aylus and it would reward Apple for gaming the discovery process and undermining the
8 IPR process.

9 **CONCLUSION**

10 Aylus respectfully requests that the Court deny Apple’s request to amend its invalidity
11 contentions to add three new prior art references to the case.

12 DATED: April 17, 2015

13 QUINN EMANUEL URQUHART &
14 SULLIVAN, LLP

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16 By /s/ Amar L Thakur

17 Amar L Thakur
18 Attorneys for Plaintiff,
19 Aylus Networks, Inc.

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